No. 10654

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*,

vs.

PUGET SOUND POWER & LIGHT COMPANY, a corporation, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE APPELLEE

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QUESTION PRESENTED

For the purpose of this case we may accept the statement of the Government that the question is whether, when the United States condemns an area traversed by a public road on which the appellee maintains an electric distribution line under a franchise, appellee is entitled to recover the cost of rebuilding such line in a new location so as to continue service to a customer located outside the area condemned. The precise question involved is the right of a public utility to recover any compensation whatever in such cases

since the proper measure of compensation is not in issue here. The Government makes no contention that the cost of reconstruction is not the proper measure of compensation in this case if any recovery is to be allowed at all. The appellee has not appealed from the disallowance of other claimed items of damage.

STATEMENT

The statement of the Government (Br. 2, 3) needs to be supplemented only by the following facts: The Company is an electric public utility operating several electric generating plants in western Washington and an extensive interconnected transmission system by means of which it distributes said electricity to the public generally in nineteen counties in the northwestern part of the state (R. 27).

ARGUMENT

I. The Fifth Amendment protects all private property, not merely "interests in land." However designated, franchises are property and are entitled to protection under the Constitution.

The Government contends, first, that the franchise vests in the Company no property rights in Bile Street; and, second, that any damages suffered by the Company are merely "consequential" damages and not recoverable under the Fifth Amendment.

There is but one question, and that is, whether by acceptance of the franchise and action thereunder the company has acquired "private property." If it has,

then the Fifth Amendment requires the payment of compensation, for the amendment is not limited to "interests in land."

Counsel say that a franchise is not "a grant of a property interest in any particular portion of the highway," that it is "a *license* to share in a public easement," "a permit to use the streets," "a mere privilege to occupy a street along with other travelers," "a part of the public rights which are shared in common," that it is not an "estate" in the highway, that it is granted merely as "provisions for the regulation of the different public rights in the street," and, on the basis of *Potomac Electric Power Co. v. United States*, 85 F.(2d) 243 (1936), that it is "a mere license revocable at will" (Br. 7-10).

Depending upon the nature of the particular case and the parties before the court, a franchise has been variously described as suggested by Counsel—but not in any condemnation case. The Government's contention disregards a long line of decisions protecting public utility franchises as property.

> "Such a street franchise has been called by various names — an incorporeal hereditament, an interest in land, an easement, a right of way—howsoever designated, it is property."
>
> *Louisville v. Cumberland Tel. & Tel. Co.*, 224 U.S. 649 (1912).

> "That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided

by this court to need more than a reference to some of the later cases."

Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58, 65 (1913).

"Whether the interest of appellant is denominated a franchise or an easement, it is a valuable property right, and its destruction would be the taking of property within the constitution. So also the interfering with such an interest may be, *pro tanto*, a taking of property which will entitle the owner to compensation. Private property forbidden by the constitution to be taken or damaged for public use without just compensation is not limited to the tangible subject matter or corpus of the property, but includes the right of user and enjoyment of it."

City of Belleville v. St. Clair County Turnpike Co., 234 Ill. 428 (1908), 84 N.E. 1049.

See also:

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893);

Los Angeles v. Los Angeles Gas & Electric Corporation, 251 U.S. 32 (1919).

II. When a franchise is acted upon and equipment is placed in a highway pursuant thereto an "interest in land" is acquired.

"We think the authorities support the contention of respondent * * * that the franchise extended by the constitutional provision to lay pipes and conduits or erect poles and supply the inhabitants of a city with artificial light, is an incorporeal hereditament—is real estate in the nature

of an easement pertaining to the streets of a city in which it is exercisable; that it is inseparably annexed to the soil out of which the profit arises, and has a local situation in the place, and that place only, where the right is actually exercised."

Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 313 (1905), 83 Pac. 54, 56.

"The right to occupy the streets with gas mains is a franchise. The actual occupation of them in in that way, pursuant to the franchise, is the acquisition of an easement. You must distinguish between the right to do the thing, and the interest acquired in the soil by the exercise of that right."

Consolidated Gas Co. v. Mayor, etc. of the City of Baltimore, 101 Md. 541 (1905), 61 Atl. 532, 534.

"Bedford's right in Springs Road was as real a property right as a leasehold of the same land, or as an abutting owner's right to access to the street."

Town of Bedford v. United States, 23 F.(2d) 453 (1927), 56 A.L.R. 360.

As between mortgagor and mortgagee the rights under a franchise are sometimes said to be an interest in land and the property held thereunder is classified as real property.

Stearns Lighting & Power Co. v. Central Trust Co., 223 Fed. 962 (1915).

In the foregoing case water pipes were held to be real estate because they were connected with the central plant of the water supply company, which was itself real estate.

Franchise rights constitute an interest in land in the state of Washington.

> *Commercial Electric Light & Power Company v. Judson*, 21 Wash. 49, 55 (1899), 56 Pac. 829.

> "Appellant's rights under its franchise were just as much property rights as if it had owned the title in fee simple to the land occupied by Jackson Street. The right to take or damage such a property right may be acquired only by eminent domain."
>
> *Great Northern Railway Company v. Seattle*, 180 Wash. 368 (1935), 39 P.(2d) 999.

Counsel cite to the contrary the case of *Dunsmuir v. Port Angeles Gas, Water, Electric Light & Power Co.*, 24 Wash. 104, 63 Pac. 1095 (Br. 10).

That was a contest between two successive mortgagees of a water system in the city of Port Angeles. When the first mortgage was given pipes had been purchased and were in the possession of the mortgagor, "but only a portion of the main had been laid"; the dam had not been built, and no rights therefor had been acquired. The mortgage itself purported to cover "the following described personal property," but it was not recorded as a chattel mortgage "in a book kept exclusively for that purpose," as required by Washington statutes then in force. Later, the principal mains of the plant having in the meantime been permanently connected together and buried in the ground and connected with various buildings in Port Angeles, and water having been turned into the mains, mortgage, which was recorded both as a real estate

another mortgage was placed on the property of the water company. This later mortgage was properly recorded both as a real estate mortgage and as a chattel mortgage. The court held that the first mortgage lost its priority because of the failure to record it as a chattel mortgage, but in so holding the court said:

> "No part of the mains and pipes covered by respondent's mortgage was connected with Frazier's Creek, or used for the purpose of conveying water, at the time the mortgage was made; and, as the greater portion thereof was neither laid in the ground nor connected together at that time, it can hardly be doubted that at least the unconnected portion, if not the whole, was in fact personal property, and properly so considered by the parties to the mortgage.
>
> * * * * * * *
>
> "If it (the mortgagor) had been the owner of land and buildings with which its pipes and mains were connected, such pipes and mains would have been deemed a part of the realty in the nature of appurtenances or fixtures, in accordance with the rule laid down in *Appeal of Des Moines Water Co.*, 48 Iowa 324, and *Monroe Water Co. v. Township of Frenchtown*, 98 Mich. 431 (57 N.W. 268)."
>
> *Dunsmuir v. Port Angeles Gas, Water, Electric Light & Power Co.*, 24 Wash. 104, 63 Pac. 1095.

It is clear that the court based its decision primarily on the ground that the pipes had, for the most part, not been laid in the streets when the mortgage was given. The remainder of the court's discussion as to

the nature of the rights acquired after the pipes were laid in the streets was not necessary to the decision. Actually, the court granted a foreclosure of the second mortgage and as a chattel mortgage. It is significant, also, that the court noted, as shown above, that such property might be deemed real property when connected with the pumping plant and source of water supply. Viewed in that light the taking of a part of the pipes laid in the street would be the taking of real property. It certainly would constitute a severance damage.

In *Fix v. Tacoma*, 171 Wash. 196 (1933), 17 P. (2d) 599, no part of the public highway was condemned. Only land abutting upon the highway was taken, which required removal of water users with consequent loss of revenue to the company. Clearly such a loss would be a business loss consequent upon taking land in which the water company had no interest.

In support of their contention that the franchise creates no interest in land, counsel rely upon *Potomac Electric Power Co. v. United States*, 85 F.(2d) 243 (1936); *Mt. Vernon, Alexandria & Washington Ry. Co. v. United States*, 75 Ct. Cl. 704 (1903); *New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397 (1903), 65 N.E. 835; and *Northern Indiana Gas & Electric Co. v. Merchants' Improvement Assn.*, 87 Ind. Ap. 74 (1928), 160 N.E. 50.

The first three of these cases are decided upon the basis of the revocable nature of the rights held under the franchise. As to the *New England Tel. & Tel.*

case see *Boston Electric Light Company v. Boston Terminal Co.*, 184 Mass. 566 (1904), 69 N.E. 346. The case at bar does not involve a revocable franchise.

The *Northern Indiana Gas* case adjudicates rights after the alley was vacated by due governmental action. Vacation is clearly distinguishable from condemnation.

III. The right to recover compensation upon condemnation of public highways has been recognized in numerous cases.

(a) When the United States has condemned the public rights represented by public bodies, such as cities, counties, etc., the right to compensation has been recognized.

Town of Nahant v. United States, 136 Fed. 273 (1905), af. 153 Fed. 520;

United States v. Certain Land in the Town of Newcastle, 165 Fed. 783 (1908);

Wayne County v. United States, 53 Ct. Cl. 417 (1920), af. 252 U.S. 574;

Town of Bedford v. United States, 23 F.(2d) 453 (1927), 56 A.L.R. 360;

United States v. Wheeler Township, 66 F. (2d) 977 (1933);

United States v. Certain Parcels of Land in Baltimore, 43 Fed. Supp. 687 (1942);

United States v. Prince William County, 9 F. Supp. 219 (1934), af. 79 F.(2d) 1007, cert. den. 297 U.S. 714;

United States v. Certain Parcels of Land in Spokane, 45 F. Supp. 899 (1942);

United States v. Alderson, 53 F. Supp. 528 (1944).

In the *Nahant* case (136 Fed. 273) the city's water and sewer pipes were permanently severed by the erection of fortifications so that reconnection was made necessary.

In the *Bedford* case (27 F.(2d) 453) new highways were required.

In the other cases cited above, except *Prince William County* (9 F. Supp. 219) and the *Newcastle* case (165 Fed. 783) public roads were taken, and in each case the public right was held to be an easement and the Federal Government was required to pay for both the public right and the improvements laid in the highway for the purpose of travel.

The *Prince William County* case (9 F. Supp. 219) was a suit to quiet title, but the right to compensation was recognized. The *Newcastle* case (165 Fed. 273) decided that the town had such an interest in the highway that it could oppose the condemnation, and that such interest was entitled to at least nominal damages.

(b) When a state condemns the public rights represented by subordinate agencies of the state, such as cities, etc., the right to compensation has been recognized.

> "If it were a private corporation which owned this water works, there would be no question as to the liability of the state to make compensation for the appropriation of the property. We can see no reason for withholding compensation

simply because the owner is a municipal corporation."

City of Little Falls v. State of New York, 190 N.Y.S. 807 (1921).

(c) When the rights of a privately owned public utility corporation have been condemned, either by a state agency or by the United States, the right to compensation has been recognized.

United States v. Boston Elevated R. R. Co., 176 Fed. 963 (1910);

New York Telephone Company v. State, 154 N.Y.S. 1059 (1915);

Petition of Gillespie, 32 N.Y.S.(2d) 96 (1942).

In the *Boston Elevated* case the Government was lessee of property abutting on a street, which it used for a post office site and the Government claimed an interest in the sidewalk area in front of the property. As such lessee it opposed the construction of a subway in the street by a franchise holder. It was held that the Government could not prevent the subway construction; that it could acquire rights in the highway as against the franchise holder only upon payment of compensation.

IV. When the United States condemns property for its purpose it occupies the position of a "stranger."

Town of Nahant v. United States, 136 Fed. 273 (1905) af. 153 Fed. 520.

United States v. Certain Land in the Town of Newcastle, 165 Fed. 783 (1908);

Town of Bedford v. United States, 23 F.(2d) 453 (1927), 56 A.L.R. 360.

V. Although a franchise is subject to the police power, that power must be exercised reasonably and only in aid of public travel on the highway.

New York and Queens Electric Light & Power Co. v. City of New York, 224 N.Y. S. 564 (1927);

Milwaukee Electric Ry. & Light Co. v. City of Milwaukee, 209 Wis. 656 (1932), 245 N.W. 856.

In the *Milwaukee* case the court said:

"Unless the removal and relocation of the lines be made necessary for the usual use of the streets by the public, and compellable in a proper and reasonable exercise of the police power by the city in the exercise of governmental authority, the owner thereof cannot be compelled to remove or relocate the same without just compensation."

The police power cannot be used to aid another privately owned public utility.

Transit Commission v. Long Island R. Co., 253 N.Y. 345 (1930), 171 N.E. 565.

Nor to aid the city's own proprietary activities.

East Rochester v. Rochester Gas & Electric Corp., 31 N.Y.S.(2d) 754 (1941);

New York v. New York Telephone Co., 278 N.Y. 9 (1938), 14 N.E.(2d) 831;

City of Los Angeles v. Los Angeles Gas & Elec. Corp., 251 U.S. 32 (1919).

VI. Property is "taken" when its usefulness is destroyed or impaired.

City of Belleville v. St. Clair County Turnpike Co., 234 Ill. 428 (1908), 84 N.E. 1049;

Peabody v. United States, 231 U.S. 530 (1913);

Morrison v. Clackamas County, 141 Ore. 564 (1933), 18 P.(2d) 814;

United States v. Welch, 217 U.S. 333 (1910);

29 C.J.§917.

VII. What is "property" is to be determined according to the local law.

Henry Ford & Son, Inc. v. Little Falls Fibre Company, 280 U.S. 369 (1930);

United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943).

Counsel cite as contrary authority *United States v. Miller*, 317 U.S. 369 (1943) (Br. 12). But this case is not entitled to consideration here for two reasons: first, the two authorities upon which it relies do not support it; second, the essential point decided in the *Miller* case was simply that the Government actually "took" the land at the time that Congress definitely showed its determination to complete the project. So that whatever happened to the land after that date (at least anything which benefited the landowner) did not increase the value of the property in his hands. *What* is taken and *when* it is taken are two different questions.

Moreover, the rule is subject to the following qualifications stated in a recent case:

> "Though the meaning of 'property' as used in * * * the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law."
>
> *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266 (1943).

VIII. A public utility is entitled to "severance" damages —such damages are within the Fifth Amendment.

The general rule that a public utility is entitled to severance damages is well established.

> *Puget Sound Power & Light Company v. Puyallup*, 51 F.(2d) 688 (1931);
>
> *Puget Sound Power & Light Company v. Public Utility District No. 1 of Whatcom County*, 123 F.(2d) 286, 290 (1941).

Damages to the remainder not taken, commonly called "severance" damages, is a part of the just compensation which must be paid by the Federal Government under the Fifth Amendment.

> *United States v. Welch*, 217 U.S. 333 (1910);
>
> *Campbell v. United States*, 266 U.S. 368 (1924);
>
> *United States v. Miller*, 317 U.S. 369, 376 (1943).

The taking of Bile Street constitutes a severance damage to the company. Its electric line in Bile Street was connected with its generating plants and by reason of such connection, if for no other reason, was an interest in land. This line must be rebuilt to continue

service to a customer who was entitled to the service. The service required the use of the whole system, from generating plant to customer. Any necessary segment of the system which is removed damages the whole system to the amount required to replace the part removed.

SUMMARY

The Government stands on a technical application of the conception of an "interest in land." The Fifth Amendment is not so restricted. Even so, a franchise holder, when he occupies the public highway with his equipment acquires an "interest in land." At all events, it is "private property" which is entitled to compensation under the Fifth Amendment. It is clear that the loss of this property results in a "severance" damage to the remainder of the company's electric system and should be paid for as such.

Having determined that the rights thus acquired are protected by the constitution, the rule applicable to consequential damages becomes immaterial. The cases involving removal of equipment used in a business will all be found to involve personal property which had not acquired the status of fixtures either to the land taken or to any other land. The "frustration of contracts" cases relied on by the Government all involved the performance of contracts which did not require the use of any specific land.

The condemnation in the instant case was occasioned by the need of the Government to provide housing facilities for workers engaged in war produc-

tion,—a plausible Federal object. But the words of Justice Holmes are pertinent:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."
>
> *Pennsylvania Coal Company v. Mahon* 260 U. S. 393, 416 (1922).

The judgment of the lower court was correct and should be affirmed.

Respectfully submitted,

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